Resources

No. 64 Fall 1998

The Newsletter of the Canadian Institute of Resources Law

Integrating Voluntary and Regulatory Environmental Management: The Legal Framework

*by Alastair R. Lucas**

Introduction

There is considerable interest in Canada and elsewhere in what have been characterized as "voluntary non-regulatory initiatives" (VNRIs) for environmental protection. The energy sector has been heavily involved in major VNRI programs and studies, including the Canadian Chemical Producers' Association's Responsible Care Program,[1] the government-industry partnership ARET Program[2] and the Conference Board of Canada/Industry Canada, "Innovators in Environmental Action" Forum[3].

Much of the literature and discussion concerning VNRIs has cast these voluntary actions and programs as in opposition to, or as alternative to, traditional command and control regulations, that usually take the form of statutory emission approval requirements backed by regulatory offences. However, papers, presentations and discussion at a November, 1998 Symposium sponsored by the Queen's University Eco-Research Chair Program in Environmental Policy made it clear that there is no question of alternatives. Rather, the real issues and the challenges lie in integrating and blending VNRIs and regulatory command and control measures into an "optimum policy mix".[4]

This commentary addresses appropriate environmental law designs for the integration of VNRIs and formal environmental Regulations. It begins with a theoretical rationale for an explicit legal framework for VNRIs, and then discusses first, the importance of a clear and relatively certain legislative framework for VNRIs; second, VNRI programs as regulatory processes; and, finally, the challenge posed by individualized regulatory standards in the integration of VNRIs and regulatory systems.

VNRIs and the Rule of Law

A starting point for the disucssion is a recognition that some kind of legal framework is necessary for appropriate and effective environmental risk management. This recognition flows first, from the centrality of the rule of law in our legal and governmental system. The Preamble to the Canadian Charter of Rights and Freedoms acknowledges the rule of law as a fundamental value, and the rights provisions of the Charter, as well as common law principles, more specifically reflect this underlying value of our legal system. For our purposes, the significant aspects of the rule of law are the Dicean precepts that disputes between citizens and the state are to be decided by the ordinary courts according to the ordinary law of the land, and that all citizens – including public officials – are equally subject to the law.[5] This formulation of the rule of law has been controversial, particularly the necessary implication that discretion exercised by government officials is the antithesis of the rule of law.[6] However, Dicey's view of the rule of law remains significant, particularly in the legality requirement that state actions affecting citizens be authorized by law, and in requirements of procedural fairness.[7]

More practical considerations flow from these fundamental values.

Implementation of VNRIs necessarily requires some legal framework, simply to authorize the actions necessary for design and implementation of voluntary non-regulatory initiatives. Legal authorization will also be required for establishment of monitoring or reporting systems and for ultimate regulatory action once it is acknowledged that non-compliance in any voluntary system must be addressed. Thus, there is no question of regulation and VNRIs standing as complete alternatives; voluntary mechanisms necessarily involve a legislative framework including essential elements such as monitoring and reporting that can be characterized as regulatory. The question is rather one of how to redesign and tailor regulatory legislation so as to maximize the effectiveness of VNRIs.

Legislative Clarity and Certainty

Much has been written about how voluntary initiatives can supplement the regulatory system.[8] They can be taken into account as factors in regulatory decisions and even by courts in prosecutions under environmental statutes in order to increase flexibility and enhance fairness and responsiveness for regulated parties.

But there is another perspective. Reliance by regulators in their decisions on voluntary initiatives or commitments may also undermine the legality of those decisions and render them challengeable by third parties on the ground that these voluntary factors are not relevant to the exercise of the regulatory powers, or perhaps that their use results in decisions taken for improper purposes outside those of the regulatory scheme.[9] If the regulatory legislation includes transparency provisions that require public notice of proposed decisions, disclosure of relevant information, and opportunities for participation, reliance on voluntary initiatives accepted in advance by regulators may result in procedural grounds for challenging decisions.

On the other hand, if voluntary initiatives are legally relevant to regulatory decisions, the voluntary mechanisms must be properly understood and taken into account in formal regulation. An example is provided by *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour).* [10] In response to the proposed Voisey's Bay mine/mill project in Labrador, the governments of Canada and Newfoundland, the Labrador Inuit Association and the Innu Nation signed a Memorandum of Understanding (MOU) that provided for establishment of a single process for environmental assessment of the undertaking. The Newfoundland Minister of the Environment then made an order under the Newfoundland Environmental Assessment Act exempting the undertaking from the application of the Newfoundland Act. Subsequently, a dispute arose concerning whether assessment of the potential impacts of an access road and airstrip constructed for the initial exploration work were included in the process under the MOU. The Inuit and Innu organizations sought judicial review to quash decisions by the Newfoundland Minister to treat the road and airstrip as works outside the MOU.

In order to decide the issue before it, the court had to consider the power to order exemptions under the Newfoundland statute and the exemption decisions made. But it also interpreted the voluntary arrangement — the MOU — to determine whether the road and airstrip were facilities included in the cooperative assessment régime agreed upon by the governments and aboriginal organizations. The conclusion was that the terms of the MOU, and particularly the definition of the word "undertaking", did contemplate inclusion of the road and airstrip. The exemption decision – part of the formal regulatory process in these circumstances – had to take into account the MOU as properly interpreted. According to the court, it did not. The result was that subsequent decisions by the Newfoundland Minister to deal with the road and airstrip under the Newfoundland EIA process, and to conclude that they were a separate undertaking not subject to the assessment process under the MOU, were quashed by the court.

None of this however presents permanent obstacles to the development and implementation of VNRIs. It simply means that regulatory legislation must be carefully reviewed, and amended to clearly authorize reliance on VNRIs in regulatory decisions. This is an important consideration in thinking about incentives for voluntary initiatives. Incentives that take the form of concessions in the regulatory system must be based on clear and certain legal authority. For example, if expedited permitting is to be an incentive for voluntary actions, there must be legal authority for the expedited procedure. It may be that the permitting power in question is framed in wide enough discretionary terms that, as a matter of interpretation, it will authorize such procedures. If, however, there is doubt, the wisest course is to seek amendment of the regulatory statute and/or regulations to clearly authorize expedited permitting in circumstances where the regulator is satisfied that voluntary initiatives have been undertaken and objectives met. This protects against third party challenges that may promote broader accountability and transparency objectives, but that undermine the confidence of all parties in the VNRIs.

VNRI Programs as Regulatory Processes

The *Labrador Inuit Association* case also illustrates that decisions by environmental regulatory officials on VNRIs may themselves be characterized as regulatory decisions subject to the disciplines of legality (in the sense of legal authority) and transparency (in the sense of legal

procedural fairness).[11] This would, for example, be the case for informal Ministerial decisions to register voluntary initiatives as part of a departmental policy of encouraging voluntary emission reductions beyond the limits established by regulatory approvals. Just as the court in the *Labrador Inuit Association* case was prepared to review the agreement that provided for a special EIA process, such decisions to register would also be subject to judicial review. If these decisions must be based on explicit statutory criteria,[12] the discretion becomes structured, so that failure to take relevant principles into account means that the registration may be quashed in judicial review proceedings. In principle, the judicial review applicant could be either a company whose application for registration was refused, or a third party who establishes public interest standing to challenge a registered VNRI.

Again, none of this presents an obstacle to the integration of VNRIs and regulatory systems. It is merely a caution that actions concerning VNRIs, such as registration, are exercises of statutory or subordinate legislative powers that have legal consequences. This may be so even, as in the *Labrador Inuit Association* case, where the legal character of the voluntary initiative decision taken is not immediately apparent, and may be thought to be simply a policy decision.

The Challenge of Individualized Standards

In provincial regulatory systems, quantitative standards for particular substances are typically not legally enforceable as such. Ambient standards may be promulgated in regulations and thus enforceable through offence provisions. However, emission standards are more likely to take the form of guidelines or objectives that are essentially policy documents. These become directly enforceable only to the extent that they are incorporated as terms and conditions of emission permits. These terms and conditions of permits are likely to also include plant process elements, as well as monitoring, testing and reporting requirements.

The result is that it may be difficult to identify common regulatory requirements to serve as a base for additional voluntary initiatives in relation, for example, to particular substances. Just as regulatory permits represent individualized standards, voluntary initiatives are likely to require individualization if they are to be effective and fair to individual permittees.

This has important implications. First, it underlines the importance of decisions to accept or to register voluntary initiatives. These registration decisions will or should be much more than routine administrative matters even for industries of the same type and class. Second, the importance of public consultation or involvement in these decisions is also underlined. Periodic review of regulatory systems and processes to consider "raising the bar" would no doubt be significant. But given this individualization of both regulatory standards and VNRI proposals, non-governmental organizations and citizens are likely to be anxious to ensure that opportunities for consultation and participation are also provided in these specific decisions. One response would be design of public processes such as notice of proposed voluntary arrangements, and opportunities for written comment, that balance the interests of government, industry and public.

Conclusion

These are by no means all of the legal implications of integrating environmental VNRIs and regulatory systems. But they are fundamental implementation issues that must be considered and addressed if VNRIs are to be effective in mitigating the inflexibilities of traditional regulation and optimizing enforcement and compliance efforts.

**Alastair R. Lucas is Professor of Law, the University of Calgary.*

Notes

1. Canadian Chemical Producers Assn. (CCPA), Responsible Care, http://www/ccpa.ca. The program involves commitment by individual companies to responsible action throughout the life cycle of their products under a standardized approach.

2. Accelerated Reduction/Elimination of Toxics (ARET), <http://www.ec.gc.ca/aret/homec.html>. The Program targets 90% reduction of 30 persistent, bioaccumulative and toxic substances by 2000; and 50% reduction of 87 other toxic substances.

3. Conference Board of Canada/Industry Canada, "Innovators in Environmental Action" (Ottawa: Conference Board of Canada, 1997).

4. Symposium on Integrating Voluntary and Regulatory: Towards a New Synthesis for Environmental Risk Management, A Policy Forum Sponsored by the Eco-Research Chair Program in Environmental Policy, Queen's University, Ottawa, November 9, 1998. Cf. D. Sinclair, "Self-Regulation Versus Command and Control? Beyond False Dichotomies" (1997), 19 Law and Policy 529.

5. A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10th Ed. by E.C.S. Wade (London: Macmillan Papermac, 1961).

6. See H. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

7. See J.M. Evans *et al.*, *Administrative Law* 28-29 (Toronto: Emond Montgomery, Fourth Edition, 1995).

8. See K. Webb, "Voluntary Initiatives and the Law" in, R. Gibson (Ed.) Voluntary Initiatives and the New Politics

of Corporate Greening (Peterborough: Broadview Press, 1998).

9. *Tetzlaff v. Canada (Minister of the Environment) and Saskatchewan Water Corporation* (1992) 6 C.E.L.R. (N.S.) 89 (Fed. C.A.) (Minister in environmental assessment screening decision characterizing admittedly "moderate" adverse environmental impacts as "insignificant"); *Heppner v. Alberta (Minister of Environment)* (1977), 4 Alta. L.R. (2d) 129 (C.A.) (restricted development area established as transportation and utility corridor when authorizing statute provided only for establishing RDAs for environment conservation and pollution control purposes).

10. (1998), 25 C.E.L.R. (N.S.) 232 (Nfld. C.A.).

11. The court said at p. 246:
"The MOU is . . . a specialized régime that is designed, not to derogate from the legislative environmental assessment process, but to facilitate its implementation. Whether one regards the MOU as a statutory instrument or a contract . . . it must be interpreted and applied in furtherance of the underlying statutory intent that was its genesis. Concepts incidental to the statutory assessment régime should equally apply to an understanding of the MOU."

12. Such as the New Directions Group's 8 Principles Governing the Design of VNRIs: New Directions Group, "Criteria and Principles for the Use of Voluntary or Non-Regulatory Initiatives to Achieve Environmental Policy Objectives" (Canmore: NDG, November 4, 1997), <http://www.expertcanmore.net/pgriss/ndg.htm>.

Recent Developments in Canadian Oil and Gas Law

*by Nigel Bankes**

Conservation Board cannot recover its abandonment costs for orphan wells when well licence transfer procedure is procedurally flawed

In *Energy Resources Conservation Board v. Sarg Oils Ltd* [1998] AJ 1039 Justice Lutz of the Alberta Court of Queen's Bench dismissed the ERCB's application to enforce the statutory indebtedness of Sarg. Back in 1988 Sarg sold a number of properties to Sundial. The deal closed in May 1988. As part of the transaction Sarg executed well licence transfers for a number of wells and these were submitted to the ERCB for its approval. Section 18(1) of the *Oil and Gas Conservation Act,* RSA 1980 c. O-5 (*OGCA*) provides that a licence shall not be transferred without the consent in writing of the Board.

Shortly after the Sarg-Sundial deal, Sundial entered into a further agreement with 3D pursuant to which 3D stripped the wells of all salvageable material and sold the material for the account of Sundial and 3D. Sundial also executed well licence transfers in the name of 3D. Some months later leases to the various properties were cancelled for non-payment of rent and the Board issued abandonment orders directed to Sarg.

Sarg consistently took the view that it no longer had an interest in the lands or the wells. Equally, the ERCB took the view that since it had never approved either licence transfer, Sarg was still the licensee of record. Ultimately, the ERCB abandoned the wells in question and sent the bill to Sarg. Section 92 of the OGCA provides that where a licensee fails to comply with an abandonment order the ERCB may carry out the abandonment and the costs of the operation "shall be determined by the Board and are a debt payable by the licensee of the well to the Board." The ERCB commenced this action seeking payment of the statutory debt. Sarg defended on the basis that the statutory debt was not enforceable because of the way in which the ERCB had dealt with the original well licence transfer application. Sarg argued that the ERCB had breached both its statutory procedural obligations owed to Sarg as well as common law duties of procedural fairness. Sarg also alleged that the debt could not be enforced either on the basis of estoppel or on the basis that the ERCB's treatment of Sarg interfered with Sarg's legitimate expectations founded upon the ERCB's past practice in dealing with transfer applications. Sarg also sought to recover from third parties, both its own lawyer and Sundial's lawyer, in the event that it were found liable. Against its own lawyer Sarg alleged negligence and against Sundial's lawyer Sarg alleged breach of trust conditions.

Evidence at trial indicated the Board was changing its policy in the treatment of well licence transfer applications at the very time that Sarg had submitted its transfer application. This change was occurring as part of a series of measures to deal with orphan wells. Prior to those changes the evidence suggested that the ERCB would approve a transfer application if an applicant presented properly executed documents accompanied by the appropriate fee and if the transferee was already a registered licensee (which Sundial was). The ERCB's changed and much more rigorous review policy was not communicated to the industry by way of the Board's standard technique, an informational letter, until December 1988. The ERCB is protected from judicial review by a series of privative clauses but the statutes also allow an appeal, with leave, on a point of law or jurisdiction to the Alberta Court of Appeal. At no

time did Sarg seek to have the ERCB review the decision that it had made on the licence transfer or avail itself of this statutory right of appeal.

In order to deal with the enforceability of the statutory debt, Justice Lutz first had to decide if Sarg could mount a collateral attack on the ERCB's decisions in relation to the matter. In deciding that it could Justice Lutz took guidance from recent decisions of the Supreme Court of Canada including *R. v. Consolidated Maybrun Mines Ltd.* (1998), 158 DLR (4th) 193 (SCC). I think that this part of the judgement is open to attack. In my view Justice Lutz gave insufficient weight to the privative and appeal clauses in the *OGCA* designed to direct judicial supervision through a statutory appeal. I also think that Justice Lutz failed to impose any onus on Sarg to pursue its remedies with the Board at an earlier time. True, the Board did delay unreasonably, but Sarg too failed to push matters as far as it could.

In also finding for Sarg on the merits, Justice Lutz had little difficulty in concluding that the ERCB had breached its statutory and common law procedural obligations by failing to inform Sarg that it was not going to approve the transfer application. It also failed thereby to accord to Sarg the opportunity to make submissions and provide additional evidence in support of its application.

Justice Lutz also accepted Sarg's arguments on estoppel and legitimate expectations. In finding an estoppel Justice Lutz was careful to note that the estoppel did not nullify the statutory discretion accorded to the Board; rather it conditioned its exercise. Although that was sufficient to dispose of the application the court went on to deal with the third party claims. Justice Lutz held that Sarg's lawyer was not negligent because he had followed standard conveyancing practice in allowing the deal to close before the well licence transfers were approved. This practice was also a reasonable practice because prior to this time the industry did not think that there was any risk associated with well licence transfers and because there was in fact no alternative because the Board had no pre-approval mechanism for licence transfers of which Sarg could have availed itself. There could be no recovery from the purchaser's lawyer because properly interpreted there was no breach of the trust conditions. The purchaser's lawyer had committed to return copies of the well licence transfers once approved but this was not a trust commitment and, in any event, could not be interpreted as a trust commitment to obtain the ERCB's approval to the transfer.

The saga of Sarg Oils is a continuing one. For collateral proceedings dealing with Sarg's obligations under the *Environmental Protection and Enhancement Act*, SA 1992, c. E-13.3 see *Sarg Oils Ltd. v. Alberta (Environmental Appeal Board)* (1996), 185 AR 118, 36 Admin. LR (2d) 134 (QB). This case involved a successful judicial review application to quash a "decision" of the EAB confirming an environmental protection order for the reclamation of certain well sites. The EAB's rehearing of that matter *Sarg Oils Ltd. v. Alberta (Department of Environmental Protection)* is available at [1996] AEABD 15 (QL). One question worth considering further is whether or not the decision of Justice Lutz has removed an essential basis for the EAB's finding.

Original reservoir conditions determine ownership where pase changes occur and petroleum and gas titles split

In 1953 the Judicial Committee of the Privy Council (in the last Canadian case to be heard by that body before the Supreme Court of Canada became final appellate tribunal for Canada) decided that where the transferor had reserved petroleum and valuable stone, the transferor and its licensees owned the oil and solution gas in a mixed pool and the transferee owned the gas cap gas. *Borys v. Canadian Pacific Railway Company and Imperial Oil Ltd* (1953), 7 WWR 546 stands for the further proposition that the petroleum owner could still produce from a mixed pool even though it might produce some gas cap as an incidental effect provided that the petroleum owner was acting reasonably. The decision said nothing about the duty to account for produced gas cap gas. Conservation legislation reinforced the preeminence of petroleum owner with the result that the gas owner could only assert its rights to gas in a mixed pool when it was time to blow down the gas cap. But what of phase changes?

The Alberta Court of Appeal offered some limited guidance on this question in *Prism Petroleum Ltd. v. Omega Hydrocarbons Ltd* (1994), 18 Alta. L.R.(2d) 225 in the context of split title unitizations of oil and gas rights but that decision turned very much on the language of the particular unitization agreements and chains of title under scrutiny. In *Anderson v. Amoco et al* [1998] AJ 805 we now have the trial decision in test case litigation designed to answer the phase change questions that were not before the court in *Borys*. Specifically, the plaintiffs claimed: (1) primary gas cap gas (hydrocarbons in a gaseous phase under initial reservoir conditions); (2) evolved gas (or secondary gas cap gas), that is gas that was originally solution gas (gas dissolved in liquid hydrocarbons in the pool under initial reservoir conditions but which emerges as gas at the surface) but which changes phase to a gas in the reservoir due to decreased pressure; (3) gas that migrates from within or under adjacent lands; (4) solution gas that emerges from connate water (all water present in a pool); (5) solution gas that emerges from connate water; and (6) condensate (hydrocarbons in a gaseous phase in the pool, dissolved in either the gas cap gas or secondary gas cap gas, but which are recovered in liquid phase at surface pressure and temperature) that emerges from the reservoir into the bottom of the well bore in gaseous phase.

Issue (1) had been decided in *Borys* and was conceded here. On the other issues the court held as follows. (2) Since *Borys* stands for the propositions

that hydrocarbon entitlement is determined under initial reservoir conditions and solution gas belongs to the petroleum owners changes in phase condition, whether they occur in the pool in the well bore or at the surface, do not affect ownership. Evolved gas is a form of solution gas which belongs to the petroleum owners. (3) Since the non-petroleum owner is only entitled to primary gas cap gas, in the interests of consistency the plaintiffs' claim to gas that migrates from adjacent lands should be limited to primary gas cap gas. (4) & (5)Since connate water is a liquid as is petroleum, and since *Borys* prefers the vernacular over the technical, hydrocarbons dissolved in connate water belong to the petroleum owner. (6) Condensate and natural gas liquids which derive from primary gas cap gas belong to the non-petroleum owner even though they are recovered as liquids. Condensate and natural gas liquids derived from the secondary gas cap belong to the petroleum owner. The determination of entitlement is to be made at initial reservoir conditions; phase at the bottom of the well bore is irrelevant.

While much of the reasoning seems sound, this cannot be said of the court's treatment of the connate water issue or its treatment of migrating gas (gas cap and evolved solution gas) which, while perhaps correct, is hardly more convincing. Sloughed off completely are the accounting issues. *Borys* held that the petroleum could produce gas cap gas an incidental part of its operations (i.e the gas owner could not shut-in the petroleum owner); *Borys* did not hold that there was no duty to account if the petroleum owner was selling the gas cap gas or otherwise putting it to beneficial use rather than simply flaring it.

In addition to the basic findings, other dicta in the case are of interest such as the comment that the rule of capture is irrelevant in determining ownership in the context of phase changes and other comments emphasising that difficulties of measurement and determination should not drive the resolution of ownership disputes. If the decision is confirmed on appeal one result may be to focus more attention on the role of the conservation board (now the Energy and Utilities Board in Alberta) in resolving disputes between petroleum owners and gas owners. Gas owners who are concerned that the petroleum rights owners are producing some of their gas may be more aggressive in seeking relief from the EUB.

The Newfoundland Supreme Court confirms that a third party cannot enforce the terms of a benefits agreement for the Terra Nova project

In enacting oil and gas disposition legislation for public lands, the "new" oil and gas producing jurisdictions have been concerned with much more than the nature of the rights granted and economic rent issues. These jurisdictions have seen oil and gas as a vehicle for economic development and without exception they require developers to enter into socio-economic agreements or plans dealing with a range of development matters and business practices including procurement policies, employment preferences for residents, training programs and educational support. These requirements are constrained to some extent by the Canadian Charter of Rights and Freedoms and to an as yet undetermined extent by trade law rules.

Newfoundland is no exception to this practice and thus when Petro Canada (PC) sought approval for its offshore Terra Nova project it had to submit a Benefits Plan for approval. One of the conditions of the plan was that PC was required "As soon as possible after Project Sanction ... [to] relocate engineering and procurement activities for the Project [from the UK] to Newfoundland." PC went ahead with the Project and then sought to resile from this condition on the grounds that it would significantly increase costs and would also result in a delay. PC proposed instead to take staff to the UK for further training. Although disappointed, the regulator, the Canada-Newfoundland Offshore Petroleum Board (the Board) decided to accept PC's proposal as fulfilment of the condition, but it did not formally waive the condition.

The City of St. John's then sought to compel the Board to enforce the condition. Justice Orsborn in *St. John's (City) v. Canada-Newfoundland Offshore Petroleum Board*, [1998] NJ 233 rejected the application and in the course of doing so offered some interesting comments on the responsibilities of the Board and on the legal character of the offshore regime. The court held that the condition was expressed in mandatory condition. It was not simply a "best efforts" undertaking and it had not been fulfilled. Nevertheless, the City could not enforce compliance for three reasons. First, the City was acting beyond its Charter in attempting to enforce the condition. Second, the City could not obtain a *mandamus* order against the Board since the relevant statute (the *Canada-Newfoundland Atlantic Accord Implementation Act*, RSN 1990, c.2, "the *Accord Act*") did not impose a clear statutory duty on the Board to enforce conditions attached to an approved benefits plan. Instead, it was clear that the *Accord Act* has "constitutional overtones". It represented a "carefully constructed" "joint management regime". Issues of economic benefits were to be left to the Board "subject only to joint direction from the governments." Third, since there was no duty owed to the City to enforce the clause, the City lacked standing for *mandamus* purposes. Furthermore , even if there were a duty the court seemed to suggest that the duty might be owed to the citizens of the City and not to the City itself.

The court's comments on the capacity of the City to sue primarily give rise to issues of administrative and municipal law rather than oil and gas law, but the court went on to comment on the quasi-constitutional nature of the offshore regime resulting as it did from a federal-provincial Accord. That

Accord, implemented by federal and provincial legislation, meant that the province was "not competent ... to give to a statutory body such as a municipality the authority to seek to require enforcement of the conditions of an employment plan approved by the Board." Stated as a limitation on power rather than as an interpretive principle, this statement goes too far since it invests the Accord and its implementing legislation with the status of a constitutional norm; is not, it is merely a federal-provincial agreement.

The Rule against Perpetuities strikes again; party saved by breach of duty of confidence

Although the common law Rule against Perpetuities has been abandoned in one Canadian province (Manitoba) and reformed in others (e.g. Alberta and Ontario) it is alive and well in Saskatchewan. So held Justice Gerein in *Taylor and Maxx Petroleums v. Scurry-Rainbow Oil (Sask.) Ltd, and Tarragon Oil and Gas et al* [1998] SJ 589 (Q.B.). T granted an oil and gas lease to Imperial in 1949 for a 10 year primary term and for so long thereafter as the leased substances were produced from the lands. That lease expired in accordance with its terms in 1959. Meanwhile, in 1950, T had granted an "Assignment and Conveyance of Petroleum and Natural Gas Royalty and Lease of Minerals" to Freeholders. The Freeholders agreement provided "upon and in the event" that the Imperial lease expired or became unenforceable within a 42 year period then Taylor would grant Freeholders a 99 year lease on certain terms. The Freeholder title became vested in Tarragon and T's title devolved to Taylor. In 1993 Maxx Petroleum entered into farmout negotiations with Tarragon. The parties reached an agreement in principle but after Maxx's lawyer inspected the title documents the deal fell apart. Maxx top-leased the lands and commenced this action seeking a declaration that the Freeholders' agreement was void by reason of the Rule. The court expressly held that the Rule was not "contrary to public policy" and upheld that claim noting the contingent nature of the language "upon and in the event". The court also held that the interest was not vested notwithstanding that it purported to take effect only on the determination of a prior estate, namely the Imperial lease.

All was not lost for Tarragon. The court went on to hold that Maxx had breached a duty of confidence owed to Tarragon: (1) the information conveyed was confidential, (2) the information was communicated in confidence in the course of joint venture or farmout negotiations, and (3) the information was given to Maxx to allow it complete its due diligence title investigations and it was misused by Maxx for its own account. The trial judge invited further argument on an appropriate remedy observing that the usual remedy would be to restore the injured party either through a constructive trust or an accounting.

This last set of findings seems unremarkable except for the fact that there has long since been open speculation in the Saskatchewan oil and gas industry as to the validity of the Freeholders top lease form. The form was hardly confidential but to be absolutely certain that the form had been used in the present case it was doubtless necessary to inspect Tarragon's documents.

Abuse of confidential information in pre-contractual negotiations was also at issue in another recent first instance judgement, this time from Alberta: *Cinabar Enterprise Ltd. v. Richland Petroleum Corp.*, [1998] AJ 891. Cinabar was peddling some properties including leases on sections 15 and 21. The leases were for 10 year primary terms continued by production or deemed production. A well would be a deemed producer if non-production was "a result of a lack of or an intermittent or uneconomical or unprofitable market or any cause whatsoever beyond the Lessee's reasonable control." A publicly available plat for the area showed two wells on section 21: one labelled "abandoned gas well" and the other labelled "dry and abandoned". There was a gas well on section 15 and this was labelled "gas well". In fact the section 15 well had long-since been shut-in and suspended and the formerly producing well on section 21 was a poor producer that had ultimately been abandoned because of a casing leak that discharged gas from the surface casing vent.

Richland entered into negotiations for the purchase of the Cinabar properties and in the course of doing so had the opportunity to review the Cinabar files. The negotiations were unsuccessful. Sometime later Richland top-leased the properties and gained a good title when Cinabar's caveats were discharged by the registrar. Cinabar had failed to take action to maintain the caveat after having been served with a notice to do so. Cinabar then alleged that Richland had used confidential information to acquire the properties and that it therefore held them on trust for Cinabar. Justice Romaine held that the information imparted to Richland by Cinabar did not have the necessary quality of confidentiality. Information as to the status of the wells was available from both the conservation board and vendors such as the supplier of the plat. Furthermore, there was little indication that Cinabar viewed any information that may have been imparted to Richland either as to the status of the wells or as to its own plans as confidential in nature. The court did not have to decide whether a well abandoned for environmental reasons rather than for its inability to produce could still be deemed to be a producing well upon tender of appropriate shut-in payments.

More detailed versions of these digests may be found in *Canadian Oil and Gas* published by Butterworths.

* *Nigel Bankes is Professor of Law at the University of Calgary and is the Canadian Oil and Gas Law reporter for the Rocky Mountain Mineral Law Foundation Newsletter.*

NEW PUBLICATION

Mineral Exploration and Mine Development in Nunavut: Working with the New Regulatory Regime
prepared and edited by Michael J. Hardin and John Donihee. 1998. 160 pages. ISBN 0-919269-46-X. $35.00

Originally provided in draft form to registrants at a conference on mineral resource development in Nunavut held in Calgary on December 11 and 12, 1997, this text has been expanded to include keynote addresses by Nancy Karetak-Lindell, James Eetoolook, Hiram Beaubier and George Miller. It also incorporates timely and practical information about the new institutions of public government established under the *Nunavut Land Claims Agreement*, their relationship to the mineral exploration and development process.

This publication will be an essential source of information to mining companies active in Nunavut, and will assist consultants, lawyers and regulators seeking an understanding of the new regulatory framework now established under the land claims agreement. The book describes the structure of government in the new territory, and explains the composition, mandate and procedures of each of the key boards, tribunals and other entities which now administer the regulatory and environmental approval process for mineral development projects on Inuit owned land and Crown land.

The first of its kind for northern mining development, this book brings together the views of Inuit decision makers, regulatory agencies, government departments and mining industry representatives on the future of mining in Nunavut, and provides a practical overview of mineral development requirements in the territory.

How to Order
Postage and Handling:
Within Canada: $2.50 first book, $1.00 each additional book
Outside Canada: $4.00 first book, $2.00 each additional book.
Outside Canada prices are in U.S. dollars.
All Canadian orders are subject to the 7% Goods and Services Tax.

To order publications, please send a numbered, authorized purchase order or a cheque payable to the *University of Calgary*. MasterCard or VISA will also be accepted. Please send orders to: Canadian Institute of Resources Law, MFH 3330, University of Calgary, Calgary, Alberta, Canada T2N 1N4

Canadian Institute of Resources Law
Room 3330, MFH
University of Calgary
Calgary, Alberta, Canada
T2N 1N4

MAIL ➔ POSTE
Canada Post Corporation / Société canadienne des postes
Postage paid / Port payé
Blk / Nbre
06178146-99
Calgary, Alberta

Resources
No. 64 Fall 1998
Resources is the newsletter of the Canadian Institute of Resources Law. Published quarterly, the newsletter's purpose is to provide timely comments on current resources law issues. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. *Resources* is mailed free of charge to more than 1,500 subscribers throughout the world. (ISSN 0714-5918)
Editor: Nancy Money

Canadian Institute of Resources Law
Executive Director: J. Owen Saunders
Research Associates: John Donihee, Janet Keeping, Steven Kennett, Monique Ross. The Canadian Institute of Resources Law was established in 1979 to undertake research, education, and publication on the law relating to Canada's renewable and non-renewable resources. Funding for the Institute is provided by the Government of Canada, the Alberta Law Foundation, other foundations, and the private sector. Donations to projects and the Resources Law Endowment Fund are tax deductible.

Canadian Institute of Resources Law
Room 3330, PF-B, The University of Calgary, 2500 University Drive N.W.
Calgary, Alberta T2N 1N4
Telephone: (403) 220-3200
Facsimile: (403) 282-6182
Internet: cirl@acs.ucalgary.ca
WWW site:http://www.acs.ucalgary.ca/~cirl

PRINTED IN CANADA